

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

COMMODITY FUTURES TRADING COMMISSION, <i>et al.</i> , Plaintiffs, v. TMTE, INC. a/k/a METALS.COM, <i>et al.</i> , Defendants; and TOWER EQUITY, LLC, Relief Defendant.	Case No.: 3:20-CV-2910-X
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**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS'
MOTION FOR A TEMPORARY STAY OF DISCOVERY AND SCHEDULING ORDER
DEADLINES**

Plaintiffs Commodity Futures Trading Commission (“CFTC” or “Commission”), and Alabama Securities Commission, State of Alaska, Arizona Corporation Commission, California Commissioner of Business Oversight, Colorado Securities Commissioner, State of Delaware, State of Florida, Office of the Attorney General and State of Florida, Office of Financial Regulation, Office of the Georgia Secretary of State, State of Hawaii, Securities Enforcement Branch, Idaho Department of Finance, Indiana Securities Commissioner, Iowa Insurance Division, Office of the Kansas Securities Commissioner, Kentucky Department of Financial Institutions, Maine Securities Administrator, State of Maryland Ex Rel the Maryland Securities Commissioner, Attorney General Dana Nessel on Behalf of the People of Michigan, Mississippi Secretary of State, Nebraska Department of Banking & Finance, Office of the Nevada Secretary of State, New Mexico Securities Division, The People of the State of New York by Letitia James, Attorney General of the State of New York, Oklahoma Department of Securities, State of South Carolina, by and through Alan Wilson, South Carolina Attorney General, and Mark Hammond, South Carolina Secretary of State, South Dakota Department of Labor & Regulation, Division of Insurance, Commissioner of the Tennessee Department of Commerce and Insurance, State of Texas, Washington State Department of Financial Institutions, West Virginia Securities Commission, and State of Wisconsin (collectively “the States”) respectfully submit this memorandum of law in opposition to Defendants’ Motion For a Temporary Stay of Discovery and Scheduling Order Deadlines (“Motion” or “Mot.”).

Plaintiffs oppose Defendants’ request to further delay this litigation. Plaintiffs filed this action in September 2020 seeking restitution for approximately 1,600 defrauded elderly investors. Since that time this case has been plagued by delay and inaction on the part of Defendants. Now, only two months after their last requested extension, Defendants again seek to delay discovery, for

an unspecified period of time, in order “to fully resolve the issue of Defendants’ access to assets for retention and payment of legal counsel”—an issue which, by Defendants’ own admission, has “loomed over this case nearly since its inception.” Mot. at 1. But, to date, Defendants have failed to take any of the prerequisite steps that would permit the parties and the Court to fairly resolve this issue. Granting Defendants’ request for delay would reward this dilatory behavior and further harm the elderly victims who are eager for resolution of this litigation.

RELEVANT PROCEDURAL HISTORY

Plaintiffs filed this action in September 2020. Shortly thereafter, in October 2020, Defendants voluntarily, and with advice of counsel, entered into a Consent Order of Preliminary Injunction (“Consent Order”), ECF No. 165, which prevents them from withdrawing, transferring, removing, dissipating, and disposing of their funds, assets, or other property. The Consent Order permits the parties to negotiate a carve out for reasonable and necessary living expenses. However, the Consent Order provides that any such expenses may be drawn solely from New Income¹ and contains certain provisions requiring Defendants to qualify that income and submit to appropriate monitoring by the Receiver, including that:

- Within two days of securing any New Income, Defendants Asher and Batashvili shall provide the name and address of the employer, person, or entity, as well the name of a contact person and telephone number from its personnel office to Plaintiffs and the Receiver. ECF No. 165 at ¶ 39.
- Within ten days of this Order [filed October 14, 2020], Defendants shall each open a single new bank account in his name to deposit any New Income, and to withdraw such funds for reasonable and necessary living expenses as ordered by the Court. The

¹ The Consent Order defines new income as “specific prospective earnings, bonuses, and/or other after-acquired income, salary, wages, commissions, dividends, draws, or other forms of compensation or passive income from any newfound employment or activity” (‘New Income’),” ECF No. 16 at ¶37, not involving “any activity related to securities, commodities, or derivatives, including but not limited to soliciting, receiving, or accepting any funds from any person or entity for the purpose of purchasing, selling, or otherwise investing in precious metals, securities, commodities, derivatives, virtual currency, binary options, or foreign currency or receive any income, salary, wages, commissions, dividends, draws, or other forms of compensation or passive income from any person or entity engaged in said activities.” *Id.* at ¶¶ 36, 38.

Receiver shall be a co-owner and have unfettered access to these new accounts. *Id.* at ¶ 40

- Within twenty-four (24) hours of opening with the Receiver as co-owner of the account, Defendants Asher and Batashvili shall provide complete information to the Receiver about the account, including the name of the bank, address, telephone number, and account number. *Id.*

To date, Defendants have not provided Plaintiffs with the identity of any employers and, to CFTC's knowledge, have not advised the Receiver of any bank accounts opened to hold New Income. Absent such information, Plaintiffs can only conclude that ***there is no New Income*** from which living expenses and/or the attorneys' fees Defendants' now seek could be derived.²

On March 30, 2021, Defendants moved to modify the Consent Order to "allow for the use of untainted assets to pay for attorney's fees." ECF No. 232 at 1 ("Motion to Modify"). In addition to "requesting to use future earnings from work outside of the commodities industry for the purpose of retaining counsel," Defendants also indicated that "[i]f provided access to their seized records, Individuals will also identify additional specific assets that are not connected to allegations of wrongdoing for unfreezing." ECF No. 232 at 25. Defendants were provided access to documents in the Receiver's possession no later than June 30, 2021. ECF Nos. 482, 482-1.

With the Motion to Modify still pending, the Court, *sua sponte*, issued a stay in October 2021, that continued the case for over 7 months. ECF Nos. 317, 380. In May 2022, the Court lifted the stay and denied, without prejudice, the Motion to Modify. The Court noted as "problematic[]" that it was "unable to tell which assets in the possession of the Receiver are 'untainted' assets." ECF No. 367 at 8. Accordingly, the Court directed Defendants to access documents held by Receiver, "determine what assets, if any, are 'untainted'," and file another motion "requesting access to assets for attorney's fees once they have completed their review and

² If Defendants currently *do* have unreported sources of New Income, they may again be in contempt of Court, *see* ECF No. 216, for failure to comply with the Consent Order. .

are able to show that any assets not related to the CFTC's investigation are available." ECF No. 367 at 9. In the event Defendants were unable to identify untainted assets, the Court alternatively instructed Defendants to file a motion "requesting access to assets for attorney's fees from income from future employment outside areas of prohibited employment." *Id.* (citing ECF Nos. 16, 165). More than ten months have elapsed since that order, but Defendants have still not filed a new motion for attorneys' fees.

In December 2022, Defendants' former counsel (Bradley Arant Boult Cummings LLP) withdrew and new counsel (Heath Hyde) filed a motion to continue the scheduling deadlines by 90 days in order to permit new counsel "sufficient opportunity to prepare a proper defense." ECF No. 480. The court partially granted the request and issued the Revised Scheduling Order, postponing the deadlines by approximately 60 days. ECF No. 487.

Rather than use that time productively, Defendants again chose to do nothing. Instead, 71 days after filing the Motion to Continue, Defendants, via yet another new counsel (Gray Reed & McGraw LLP), filed the instant Motion asking the Court to stay all discovery and scheduling order deadlines indefinitely until such time that the parties or the Court are able to resolve the issue of attorneys' fees.

ARGUMENT

As an initial matter, Plaintiffs oppose Defendants' requested stay on the basis that it is for an indeterminate period of time. Pursuant to Defendants' Motion, the stay would only end once the attorneys' fee issue is "resolved" (presumably in Defendants' favor)—either (i) by the parties, at an upcoming mediation³ or (ii) by the Court, in response to a motion to be filed by Defendants

³ The mediation (which is now scheduled for April 6) was scheduled in response to the Court's October 7, 2022, order, ECF No. 452, directing the Receiver and Defendants to mediate the issues raised in the Receiver's Emergency Motion for Show Cause Hearing to Hold Defendants Lucas Asher and Simon Batashvili in Civil Contempt. ECF No. 311. At the request of Defendants' new counsel, counsel for CFTC has agreed to attend the mediation in order to discuss

within 14 days of an unsuccessful mediation. Despite Defendants’ repeated characterization of the stay as “short” and “temporary,” it is unclear to Plaintiffs why Defendants believe that this previously intractable problem can now be resolved within a matter of weeks. As a result of their own inaction, Defendants sit in essentially the same position they did in 2021 when they first sought access to funds for attorneys’ fees in their Motion to Modify. Defendants chose to ignore the obligations put on them in the Court’s May 2022 Order, ECF No. 367, and have failed to do the one thing that would allow for resolution of this issue—identify untainted assets currently held by the Receiver or identify New Income. Without this information, a quick resolution of the attorneys’ fee issue is exceedingly unlikely. The Court should not delay discovery indefinitely while the parties pursue this possibly futile exercise.

Moreover, Defendants have failed to establish that good cause exists for granting Defendants’ requested stay of discovery and scheduling order deadlines. *See* ECF No. 487 at ¶17 (“The Court will view with disfavor and will deny—absent a showing of good cause—requests for extensions of these deadlines”). Defendants argue that “[if] a stay is not issued . . . Defendants would be greatly prejudiced by not having the resources to adequately participate in discovery or defend their case.” Mot. at 4. But any prejudice that Defendants would suffer is entirely of their own making. As set forth above, Defendants had ample time to resolve the issue of attorneys’ fees before discovery began.

Defendants also argue that “[t]his stay would not prejudice Plaintiffs as no meaningful discovery has taken place.” Mot. at 4. Again, Defendants cannot rely on their prior dilatory litigation tactics to justify further delay. Plaintiffs’ attempts to engage in the discovery process

the issue of attorney’s fees. In the event the Parties and Receiver reach a negotiated resolution on the issue of attorneys’ fees, Plaintiffs understand that the Parties would nonetheless need to seek the Court’s approval to modify the Consent Order.

have been met with delay and avoidance by Defendants.⁴ Moreover, Defendants ignore that delaying the resolution of this litigation would harm the more than 1,600 elderly investors who have been awaiting resolution of this matter, including distribution of restitution funds, for more than 2 ½ years.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court deny the Motion.

Dated: March 29, 2023

Respectfully submitted,

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⁴ For example, on March 22, 2021, Plaintiffs served their Initial Disclosures. By contrast, Defendants served their Initial Disclosures on September 14, 2022, only after being prompted by Plaintiffs. On December 29, 2022, Plaintiffs served Interrogatories on Defendants. Defendants have failed to respond. On January 4, 2023, Plaintiffs filed a designation of expert and on February 27, 2023, complied with Fed. R. Civ. P. 26(a)(2) by serving their expert report on Defendants. Defendants did not designate any affirmative experts and have requested that Plaintiffs agree to extend the deadline for designating a rebuttal expert. Plaintiffs' attempts to schedule depositions have been hindered by the changes in defense counsel and, until recently, counsel's failure to respond to Plaintiffs' request to discuss discovery issues, including deposition scheduling. Now, depositions have been or will be rescheduled to accommodate Defendants' newest counsel's schedule.

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On March 29, 2023, I electronically filed the foregoing **PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR A TEMPORARY STAY OF DISCOVERY AND SCHEDULING ORDER DEADLINE** in the above-captioned matter using the CM/ECF system and I am relying upon the transmission of the Clerk's Notice of Electronic Filing for service upon all parties in this litigation.

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